

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANITA ROSE CHAVEZ,)
Plaintiff,) No. CV-09-352-JPH
v.) ORDER GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
of Social Security,)
Defendant.)

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on October 1, 2010 (Ct. Rec. 14, 18). Attorney Lora Lee Stover represents plaintiff; Special Assistant United States Attorney Carol Hoch represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 7). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment (Ct. Rec. 18) and **DENIES** plaintiff's motion for summary judgment (Ct. Rec. 14).

JURISDICTION

Plaintiff protectively applied for disability insurance benefits (DIB) and supplemental security income benefits (SSI) on May 11, 2006, alleging disability beginning May 2, 2006 (Tr. 69-71, 773-777). The applications were denied initially and on reconsideration (Tr. 37-38, 41-44).

1 At a hearing before Administrative Law Judge (ALJ) Richard
2 Say on March 13, 2008, plaintiff, represented by counsel, and a
3 vocational expert testified (Tr. 964-997). On May 10, 2008, the
4 ALJ issued an unfavorable decision (Tr. 19-32). The Appeals
5 Council denied Ms. Chavez's request for review on October 13, 2009
6 (Tr. 4-8). Therefore, the ALJ's decision became the final decision
7 of the Commissioner, which is appealable to the district court
8 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
9 judicial review pursuant to 42 U.S.C. § 405(g) on November 24,
10 2009 (Ct. Rec. 1,4).

STATEMENT OF FACTS

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, the briefs of both plaintiff and
14 the Commissioner, and are briefly summarized here.

15 Plaintiff was 52 years old at onset, 54 at the hearing, and
16 55 on the date of the ALJ's decision (Tr. 32, 69, 968). Ms. Chavez
17 earned a GED and is four credits short of completing an
18 associate's degree in nursing (Tr. 158, 609, 611, 968). In 2004
19 she earned a certificate and became a certified nursing assistant
20 (Tr. 158).

21 Plaintiff last worked in May 2006 (Tr. 146, 969). She has
22 worked as a customer service representative, telephone solicitor,
23 cook, nurse's assistant, waitress, housekeeper and assistant lodge
24 manager (Tr. 107, 118-120, 132, 971-972, 990-991). She alleges
25 disability due to diabetes, diabetic neuropathy, arthritis, left
26 shoulder/arm and hand impairments, right arm problems, sleep
27 apnea, ulcers, high blood pressure, depression, and anxiety (Tr.
28 151, 973-975). Plaintiff is left handed (Tr. 969). Right shoulder

1 pain causes sleep problems and she is unable to lift her right
2 hand overhead (Tr. 975, 977). Plaintiff naps 2-3 hours at a time,
3 four or five days a week; shares household chores with her
4 significant other; cooks, makes the bed, and does laundry (Tr.
5 609, 979). In an average week plaintiff has two good days (with
6 less pain). On the bad days she is only able to watch television
7 (Tr. 980). Prescribed medication causes morning grogginess and
8 sluggishness (Tr. 983). Plaintiff can sit 30 minutes, stand 10-15,
9 walk six blocks, and lift five pounds (Tr. 986-987). Prescribed
10 medication helps with depression. Ms. Chavez attends counseling
11 once a week (Tr. 983-985).

12 **SEQUENTIAL EVALUATION PROCESS**

13 The Social Security Act (the Act) defines disability as the
14 "inability to engage in any substantial gainful activity by reason
15 of any medically determinable physical or mental impairment which
16 can be expected to result in death or which has lasted or can be
17 expected to last for a continuous period of not less than twelve
18 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
19 provides that a Plaintiff shall be determined to be under a
20 disability only if any impairments are of such severity that a
21 plaintiff is not only unable to do previous work but cannot,
22 considering plaintiff's age, education and work experiences,
23 engage in any other substantial gainful work which exists in the
24 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
25 Thus, the definition of disability consists of both medical and
26 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
27 (9th Cir. 2001).

28 The Commissioner has established a five-step sequential

1 evaluation process for determining whether a person is disabled.
2 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
3 is engaged in substantial gainful activities. If so, benefits are
4 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
5 the decision maker proceeds to step two, which determines whether
6 plaintiff has a medically severe impairment or combination of
7 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

8 If plaintiff does not have a severe impairment or combination
9 of impairments, the disability claim is denied. If the impairment
10 is severe, the evaluation proceeds to the third step, which
11 compares plaintiff's impairment with a number of listed
12 impairments acknowledged by the Commissioner to be so severe as to
13 preclude substantial gainful activity. 20 C.F.R. §§
14 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,
15 App. 1. If the impairment meets or equals one of the listed
16 impairments, plaintiff is conclusively presumed to be disabled.
17 If the impairment is not one conclusively presumed to be
18 disabling, the evaluation proceeds to the fourth step, which
19 determines whether the impairment prevents plaintiff from
20 performing work which was performed in the past. If a plaintiff is
21 able to perform previous work, that Plaintiff is deemed not
22 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
23 this step, plaintiff's residual functional capacity (RFC)
24 assessment is considered. If plaintiff cannot perform this work,
25 the fifth and final step in the process determines whether
26 plaintiff is able to perform other work in the national economy in
27 view of plaintiff's residual functional capacity, age, education
28 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),

1 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

2 The initial burden of proof rests upon plaintiff to establish
 3 a *prima facie* case of entitlement to disability benefits.

4 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
 5 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
 6 met once plaintiff establishes that a physical or mental
 7 impairment prevents the performance of previous work. *Hoffman v.*
 8 *Heckler*, 785 F.3d 1423, 1425 (9th Cir. 1986). The burden then
 9 shifts, at step five, to the Commissioner to show that (1)
 10 plaintiff can perform other substantial gainful activity and (2) a
 11 "significant number of jobs exist in the national economy" which
 12 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
 13 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

14 **STANDARD OF REVIEW**

15 Congress has provided a limited scope of judicial review of a
 16 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 17 the Commissioner's decision, made through an ALJ, when the
 18 determination is not based on legal error and is supported by
 19 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
 20 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9th Cir. 1999). "The
 21 [Commissioner's] determination that a plaintiff is not disabled
 22 will be upheld if the findings of fact are supported by
 23 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
 24 Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is
 25 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
 26 1119 n. 10 (9th Cir. 1975), but less than a preponderance.

27 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);

28 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d

1 573, 576 (9th Cir. 1988). Substantial evidence "means such
 2 evidence as a reasonable mind might accept as adequate to support
 3 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 4 (citations omitted). "[S]uch inferences and conclusions as the
 5 [Commissioner] may reasonably draw from the evidence" will also be
 6 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
 7 review, the Court considers the record as a whole, not just the
 8 evidence supporting the decision of the Commissioner. *Weetman v.*
 9 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
 10 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

11 It is the role of the trier of fact, not this Court, to
 12 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
 13 evidence supports more than one rational interpretation, the Court
 14 may not substitute its judgment for that of the Commissioner.
 15 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 16 (9th Cir. 1984). Nevertheless, a decision supported by substantial
 17 evidence will still be set aside if the proper legal standards
 18 were not applied in weighing the evidence and making the decision.
 19 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432,
 20 433 (9th Cir. 1987). Thus, if there is substantial evidence to
 21 support the administrative findings, or if there is conflicting
 22 evidence that will support a finding of either disability or
 23 nondisability, the finding of the Commissioner is conclusive.
 24 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

25 **ALJ'S FINDINGS**

26 The ALJ found plaintiff was insured through June 30, 2008 for
 27 DIB purposes (Tr. 19, 21). At step one he found Ms. Chavez has not
 28 engaged in substantial gainful activity since onset (Tr. 21). At

1 steps two and three, he found she suffers from obesity, diabetes,
2 and shoulder arthritis (status post right rotator cuff repair),
3 impairments that are severe but which do not alone or in
4 combination meet or medically equal a Listed impairment (Tr. 21,
5 29). The ALJ found plaintiff less than fully credible (Tr. 30). At
6 step four, he found she is able to perform her past job as a
7 telephone solicitor (Tr. 31). Alternatively, at step five, relying
8 on the VE, he found transferrable skills enable plaintiff to work
9 as a dietary clerk (Tr. 31). Accordingly, the ALJ found plaintiff
10 was not disabled as defined by the Social Security Act during the
11 relevant period (Tr. 32).

12 ISSUES

13 Plaintiff contends the Commissioner erred when he (1) failed
14 to find mental impairments, diabetic neuropathy, and left
15 shoulder/arm and hand impairments severe at step two; (2) weighed
16 the opinions of "providers and consultative examiners"; and (3)
17 assessed credibility (Ct. Rec. 15 at 7). Plaintiff's remaining
18 arguments (the ALJ erred by leaving out some limitations in the
19 RFC assessment and in the hypothetical to the VE) simply recast
20 the first three arguments.

21 Asserting the ALJ's decision is supported by substantial
22 evidence and free of harmful error, the Commissioner asks the
23 Court to affirm (Ct. Rec. 19 at 20).

24 DISCUSSION

25 A. Weighing medical evidence

26 In social security proceedings, the claimant must prove the
27 existence of a physical or mental impairment by providing medical
28 evidence consisting of signs, symptoms, and laboratory findings;

1 the claimant's own statement of symptoms alone will not suffice.
 2 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
 3 on the basis of a medically determinable impairment which can be
 4 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
 5 medical evidence of an underlying impairment has been shown,
 6 medical findings are not required to support the alleged severity
 7 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
 8 1991).

9 A treating physician's opinion is given special weight
 10 because of familiarity with the claimant and the claimant's
 11 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
 12 1989). However, the treating physician's opinion is not
 13 "necessarily conclusive as to either a physical condition or the
 14 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
 15 751 (9th Cir. 1989)(citations omitted). More weight is given to a
 16 treating physician than an examining physician. *Lester v. Chater*,
 17 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
 18 given to the opinions of treating and examining physicians than to
 19 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
 20 (9th Cir. 2004). If the treating or examining physician's opinions
 21 are not contradicted, they can be rejected only with clear and
 22 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
 23 ALJ may reject an opinion if he states specific, legitimate
 24 reasons that are supported by substantial evidence. See *Flaten v.*
 25 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
 26 1995).

27 In addition to the testimony of a nonexamining medical
 28 advisor, the ALJ must have other evidence to support a decision to

1 reject the opinion of a treating physician, such as laboratory
 2 test results, contrary reports from examining physicians, and
 3 testimony from the claimant that was inconsistent with the
 4 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
 5 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
 6 Cir. 1995).

7 Mental impairments

8 Plaintiff alleges the ALJ failed to properly credit two
 9 opinions of her mental functioning. The first is an opinion
 10 rendered the day before the hearing, on March 12, 2008, by
 11 treatment provider Aimee Lawrence, MSW (Tr. 582). Second,
 12 plaintiff alleges the ALJ failed to properly credit the opinion of
 13 examining professionals W. Scott Mabee, Ph.D. and Abigail Osborne-
 14 Elmer, MS, LMHC, rendered six days after the hearing on March 19,
 15 2008 (Tr. 611)(Ct. Rec. 15 at 12-13).

16 Ms. Lawrence treated plaintiff from August 20, 2007 through
 17 at least March 12, 2008, when she opined Ms. Chavez's mental
 18 health symptoms "are severe enough that she would not be able to
 19 maintain employment" (Tr. 582). Four months earlier, in November
 20 2007, Ms. Lawrence assessed a GAF of 65, indicating some mild
 21 symptoms or difficulty but generally functioning pretty well¹ (Tr.
 22 24, 596).

23 Dr. Mabee and Ms. Osborne-Elmer diagnosed major depressive
 24 disorder (recurrent, moderate) and rule out opioid abuse. They
 25 assessed a GAF of 58 (Tr. 611). At first plaintiff said insulin is

26
 27 ¹ Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. at
 28 p. 32(DSM IV)(2005).

1 the only drug she takes. Later Ms. Chavez admitted she takes
 2 hydrocodone four times daily. Dr. Mabee recommended referral for a
 3 drug and alcohol evaluation (Tr. 611).

4 To further aid in weighing the conflicting medical evidence,
 5 the ALJ evaluated plaintiff's credibility and found her less than
 6 fully credible (Tr. 21). Credibility determinations bear on
 7 evaluations of medical evidence when an ALJ is presented with
 8 conflicting medical opinions or inconsistency between a claimant's
 9 subjective complaints and diagnosed condition. See *Webb v.*

10 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

11 It is the province of the ALJ to make credibility
 12 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
 13 1995). However, the ALJ's findings must be supported by specific
 14 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
 15 1990). Once the claimant produces medical evidence of an
 16 underlying medical impairment, the ALJ may not discredit testimony
 17 as to the severity of an impairment because it is unsupported by
 18 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
 19 1998). Absent affirmative evidence of malingering, the ALJ's
 20 reasons for rejecting the claimant's testimony must be "clear and
 21 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
 22 "General findings are insufficient: rather the ALJ must identify
 23 what testimony not credible and what evidence undermines the
 24 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
 25 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

26 The ALJ found plaintiff less than credible because she made
 27 inconsistent statements, failed to comply with treatment, engaged
 28 in drug seeking behavior, and engaged in activities inconsistent

1 with the degree of claimed limitation (Tr. 30-31).

2 ALJ Say observes plaintiff testified she last worked in May
 3 2006 (Tr. 30 referring to Tr. 969), did not work in 2006, worked
 4 regularly as a housekeeper in June 2005, and last worked in
 5 October 2005 (Tr. 30, Ex. 1F/251, 253, Tr. 146, 302, 413, 415,
 6 485). Ms. Chavez inconsistently reports she completed 1-2 years of
 7 college (Tr. 158, 518) and 2½ years of college (Tr. 485).

8 Depression began in 2000 (Tr. 584) and in 2004 (Tr. 593), as the
 9 ALJ points out (Tr. 31). The ALJ observes plaintiff inconsistently
 10 reports drug use (Tr. 31). As noted, Ms. Chavez first told Dr.
 11 Mabee the only drug she takes is insulin, but later admitted she
 12 takes hydrocodone four times daily (Tr. 611). See also Tr. 446
 13 (says used cocaine intravenously for one year and stopped in
 14 2000); Tr. 484 (was a binge drinker); Tr. 500 (in January 2006,
 15 "off of drugs for a while"); Tr. 836 (in July 2008 drinks rarely);
 16 Tr. 518 (in July 2005 says quit in drinking in 1992).

17 The ALJ observes plaintiff failed to comply with treatment
 18 recommendations for diabetes (Tr. 30, citing Ex. 1F/69, 71, 327,
 19 355, Ex. 2F, Ex. 7F, Tr. 230, 232, 524). Ms. Chavez inexplicably
 20 failed to comply with treating her shoulder as directed after
 21 rotator cuff repair surgery (Tr. 30, citing Ex. 1F/5-55, Tr. 210-
 22 212).

23 Finally, the ALJ notes plaintiff told PAC Barbara Tritt in
 24 July 2005 she is raising two grandchildren (Tr. 22, referring to
 25 Ex. 1F/355-358); see also Tr. 99 (in May 2006, three weeks after
 26 onset, reports raising grandchildren); and Tr. 232 (in April 2007,
 27 takes care of three grandchildren); Tr. 274 (in September 2007
 28 "experiencing considerable stress raising her four

1 grandchildren"), activities inconsistent with claimed severe
 2 mental and physical limitations (Tr. 28). See e.g., *Rollins v.*
 3 *Massanari*, 261 F.3d 853, 857 (9th Cir 2001)(claims of totally
 4 disabling pain may be undermined daily activities such as
 5 attending to the needs of young children).

6 The ALJ's reasons for finding plaintiff less than fully
 7 credible are clear, convincing, and fully supported by the record.
 8 See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002)
 9 (proper factors include inconsistencies in plaintiff's statements,
 10 inconsistencies between statements and conduct, and extent of
 11 daily activities). Noncompliance with medical care or unexplained
 12 or inadequately explained reasons for failing to seek medical
 13 treatment also cast doubt on a claimant's subjective complaints.
 14 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603
 15 (9th Cir. 1989).

16 The ALJ considered Ms. Chavez's credibility when he weighed
 17 the conflicting evidence of psychological impairment. He rejected
 18 Ms. Lawrence's opinion plaintiff cannot work because (1) it is
 19 inconsistent with treating source GAFs of 60-70, indicating only
 20 mild to moderate symptoms; (2) Ms. Lawrence is not an acceptable
 21 treating source as defined by the applicable regulations², and (3)
 22 her opinion appears based at least in part on plaintiff's
 23 unreliable self-report (Tr. 28).

24 The ALJ correctly rejected Ms. Lawrence's opinion because it
 25 is contradicted by other treating sources' (including her own)
 26 opinions assessing only mild to moderate limitation (Tr. 28). See
 27 Tr. 480, 486, 501 (GAF 60-70, Melissa Leffler, ARNP, January
 28

²See 20 C.F.R. § 404.1502; 20 C.F.R. § 404.1513(a).
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1 through May, 2006); Tr. 595 (GAF 60 - August 2007, Lawrence) and
 2 Tr. 596 (GAF 65 - November 2007, Lawrence). Second, the ALJ was
 3 under no obligation to accord Ms. Lawrence's opinion special
 4 weight. 20 C.F.R. § 404.1513(d) ("[W]e may also use evidence from
 5 other sources to show the severity of your impairment(s) and how
 6 it affects your ability to work.")(emphasis added). Third, the
 7 Commissioner is correct the ALJ was not required to credit
 8 opinions based on plaintiff's unreliable self-report (Ct. Rec. 19
 9 at 13). *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir 2005).
 10 Finally, after an assessment in January of 2007, the ALJ notes
 11 plaintiff did not seek treatment until July 2007 (Tr. 28, 583,
 12 593-596).

13 The ALJ gave specific and legitimate reasons for rejecting
 14 Ms. Lawrence's contradicted opinion.

15 The ALJ notes examining psychologist Dr. Mabee opined
 16 plaintiff's largest barrier to employment was her "perceived"
 17 physical limitations and depressive disorder, which he opined
 18 would improve with treatment. The ALJ points out plaintiff
 19 admitted she had not taken antidepressants for 2-3 months before
 20 this evaluation even though she acknowledged medication improved
 21 her depression (Tr. 27, 29). Impairments effectively controlled
 22 with medication are not disabling for social security purposes.
 23 *Ware v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 99th Cir.
 24 2006). The ALJ properly discredited this contradicted opinion
 25 because it too appears based in part plaintiff's unreliable
 26 statements. Opinions based on a claimant's unreliable self report
 27 may be rejected by the ALJ. *Bayliss v. Barnhart*, 427 F.3d 1211,
 28 1217 (9th Cir. 2005).

1 Physical impairments

2 Plaintiff alleges the ALJ should have found at step two she
3 suffers from the severe impairments of diabetic neuropathy and
4 "left shoulder/arm and hand" impairments (Ct. Rec. 15 at 10-12).

5 The ALJ found plaintiff's left arm thrombosis and left carpal
6 tunnel syndrome are not severe because they did not last twelve
7 months as required by the Act (Tr. 28). The ALJ is correct.
8 Thrombosis developed in February 2006, plaintiff complained of
9 swelling three months later, and tests in August 2006 were
10 negative for acute thrombosis. There were no further complaints
11 (Tr. 28; Ex. 1F at 186, 278-288, 313-314, 327-328, and 333-335).
12 Similarly, studies in July or August 2007 revealed left carpal
13 tunnel syndrome. A month later Ms. Chavez had surgery. She was
14 pleased with the results at her two week check up. She did not
15 seek further treatment (Tr. 28, 263, 269). Plaintiff underwent
16 surgery in September 2006 to repair a partially torn right rotator
17 cuff (Tr. 217-218). Although Ms. Chavez failed to comply with
18 treatment instructions and delayed physical therapy, by February
19 2007 her arm strength was 5/5 (Tr. 24-25; Ex. 1F/48-49). The ALJ
20 also considered plaintiff's diminished credibility when he weighed
21 evidence of physical limitation.

22 With respect to diabetic neuropathy, the ALJ considered
23 results of an October 2007 examination: sensation in the lower
24 extremities was intact, as were DP pulses (Tr. 26; Ex. 2F).
25 Plaintiff had onychomycosis, admitted she often forgot her evening
26 insulin, and continued taking the "70/30" dose despite medical
27 instructions to stop (Id). Tests in April 2007 revealed no
28 retinopathy (Tr. 232).

1 The ALJ is responsible for reviewing the evidence and
2 resolving conflicts or ambiguities in testimony. *Magallanes v.*
3 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
4 trier of fact, not this court, to resolve conflicts in evidence.
5 *Richardson*, 402 U.S. at 400. The court has a limited role in
6 determining whether the ALJ's decision is supported by substantial
7 evidence and may not substitute its own judgment for that of the
8 ALJ, even if it might justifiably have reached a different result
9 upon de novo review. 42 U.S.C. § 405 (q).

10 The ALJ's assessment of the evidence is fully supported by
11 the record and free of harmful legal error.

12 The evidence considered by the Appeals Council but not by the
13 ALJ does not change the Court's view. On June 19, 2008, about a
14 month after the ALJ's decision, records show plaintiff made 17 ER
15 visits in six months and changed primary doctors within the same
16 time period (Tr. 800); on June 8, 2008, admitted a history of
17 alcohol abuse but still drinks (Tr. 805), and in April 2008 a new
18 treatment provider was very concerned about duplication of
19 medications (Tr. 794). The additional evidence does not require
20 remand.

CONCLUSION

Having reviewed the record and the ALJ's conclusions, this court finds that the ALJ's decision is free of legal error and supported by substantial evidence..

IT IS ORDERED:

26 1. Defendant's Motion for Summary Judgment (Ct. Rec. 18) is
27 **GRANTED.**

28 2. Plaintiff's Motion for Summary Judgment (Ct. Rec. 14) is

1 **DENIED.**

2 The District Court Executive is directed to file this Order,
3 provide copies to counsel, enter judgment in favor of defendant,
4 and **CLOSE** this file.

5 DATED this 13th day of December, 2010.

6
7 s/ James P. Hutton
JAMES P. HUTTON
8 UNITED STATES MAGISTRATE JUDGE
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